

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK
3 In re Meta Materials Inc. : 1:21-CV-07203 (CBA)(JRC)
4 Securities Litigation :
5 :
6 : United States Courthouse
7 : Brooklyn, New York
8 :
9 : February 27, 2023
10 : 2:00 p.m.
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10 TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
11 BEFORE THE HONORABLE CAROL BAGLEY AMON
12 UNITED STATES DISTRICT JUDGE

12 A P P E A R A N C E S:

13 For the Movant: Levi & Korsinsky LLP
14 55 Broadway, 10th Floor
15 New York, New York 10006

16 BY: ADAM APTON, ESQ.

17 For the Defendant: WILSON SONSINI GOODRICH & ROSATI, P.C.
18 701 Fifth Avenue, Ste 5100
19 Seattle, Washington 98104

20 BY: GREGORY LEWIS WATTS, ESQ.

21 WILSON SONSINI GOODRICH & ROSATI, P.C.
22 650 Page Mill Road
23 Palo Alto, California 94304

24 BY: BETTY CHANG ROWE, ESQ.

25 Court Reporter: JAMIE A. STANTON PARISI, RPR, CRR
Official Court Reporter
Telephone: (718) 613-2274
E-mail: JamieStanton.edny@gmail.com

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1 (In open court.)

2 THE COURTROOM DEPUTY: Good afternoon, everyone.

3 This is In Re Meta Materials, case number 21 CV 7203 on for
4 oral argument.

5 Can the parties please state their names for the
6 record, beginning with Defendants?

7 MR. WATTS: Yes, for Defendants, Greg Watts of
8 Wilson Sonsini.

9 MS. ROWE: Betty Rowe from Wilson Sonsini.

10 THE COURT: Good afternoon.

11 MR. APTON: And good afternoon, Your Honor. Adam
12 Apton from Levi & Korsinsky. We represent the Plaintiffs.

13 THE COURT: Good afternoon. All right, everyone
14 can be seated. It's easiest to do your arguments sitting
15 because of the way our microphone setup is.

16 Mr. Watts, are you arguing -- you will be arguing
17 for the Defendant?

18 MR. WATTS: I am, Your Honor.

19 THE COURT: Do you want to give me your top
20 points?

21 MR. WATTS: Sure. May it please the Court, Your
22 Honor. Meta Materials or Meta, as I will refer to them
23 during today's hearing, is a developer of high-performance
24 meta materials. Meta materials are composite structures
25 consisting of conventional materials like plastic or glass

1 or other metals that are engineered to exhibit enhancing
2 properties for commercial application.

3 Throughout the punitive class period in the
4 securities class action, Meta repeatedly disclosed that its
5 technologies and products were and are in development and
6 not ready for volume commercialization. Plaintiffs gripe,
7 it appears, is that development of technologies of this
8 innovative space are not progressing as fast as Plaintiffs
9 like. But the development of cutting-edge technologies and
10 products takes time and is not guaranteed to result in
11 commercialized profitable market accepted products. A
12 corporation or individual can lead, advance the science and
13 pioneer technological advances, but, nonetheless, fail
14 commercially.

15 While Meta fully intends to succeed in time, as
16 with any scientific endeavor or investment, there can be no
17 guarantees. The crux of Plaintiff's case is that Meta
18 fraudulently described itself as a company with products
19 ready for commercialization. Both their complaint and their
20 opposition focus on the following two phrases.

21 The first phrase is that Meta stated it is quote,
22 now moving toward commercializing products, close quote.

23 The second phrase is that Meta has, quote, scalable
24 manufacturing methods, close quote.

25 These statements did not and could not incur any

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1 investor misimpressions that Meta had fully developed
2 products ready for large-scale commercialization for four
3 reasons:

4 Reason number one, the actual language used by
5 Defendants did not convey that Meta had commercial-ready
6 products, but, instead, merely conveyed that Meta was,
7 quote, moving toward commercialization.

8 THE COURT: What does that mean, "moving toward
9 commercialization"? What is one to gather from that
10 statement?

11 MR. WATTS: That the company is taking steps
12 moving towards a goal. It's a projective statement about
13 the future.

14 THE COURT: There are two allegations that seem
15 problematic that I would like you to address. The
16 allegation with respect to -- and I'm probably getting the
17 names wrong, the "nano" technology, that it was dependant on
18 having a license to do it. And the license had lapsed, so
19 you couldn't have been moving anywhere without the license,
20 without the requisite license.

21 MR. WATTS: Sure, Your Honor.

22 So during the class period, the only statement
23 made by the company was about the NanoWeb technology, that
24 it was in development and that it was in the early stages of
25 development, that's paragraph 311 of the complaint, and that

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1 it is also merely a prototype, also paragraph 311.

2 THE COURT: That's not something that was claimed
3 to be now moving towards commercialization, that didn't
4 apply to that technology?

5 MR. WATTS: It's unclear from the statement as to
6 what particular products the company was referring to. I
7 don't believe this would have been the one, in light of it
8 being in the early stages of development, Your Honor.

9 To get to your particular question about the
10 NANOWEB technology and license, so the company said nothing
11 publicly about the license regarding NANOWEB.

12 THE COURT: No, but if you don't have one, you
13 can't be developing it, correct? If you don't have a
14 license to do the technology.

15 MR. WATTS: I don't believe that's correct, Your
16 Honor. For example, the NANOWEB technology could have gone
17 past what the patent protected. The company could have had
18 other patent-protected NANOWEB technology. There is no
19 allegation that the license was exclusive and picked up by
20 another competitor. So at some point in time, the company
21 could have repurchased the license, if it deemed fit to do
22 so and worthy of some commercial reason. So there may --

23 THE COURT: It developed prototypes, right, or
24 samples I think it said?

25 MR. WATTS: That's correct.

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1 THE COURT: How did you do that without a license?

2 MR. WATTS: You don't need the license to develop
3 the product. You can't commercialize it. And there is no
4 allegation that they were somehow violating that patent or,
5 therefore, infringing upon the license. They were
6 developing NANOWEB technology.

7 THE COURT: All right. With respect to the
8 glucoWISE, there's allegations that that was totally
9 unproven scientifically. Why weren't statements regarding
10 the viability of that technology false in light of the claim
11 that they were -- the whole technology was unproven
12 scientifically?

13 MR. WATTS: So it's important to distinguish
14 between Plaintiff's characterization of my client's
15 statements and the actual statements made by Defendants.
16 Nowhere did the company say that the glucoWISE technology
17 was scientifically proven, ready for commercialization, or
18 even had a product. All they had said was the following:
19 In the proxy, the February 2021 proxy, the company said
20 nothing about glucoWISE. The name was never mentioned.
21 While it did mention gluco sensing technology, all it said
22 was that that product was under development, and that
23 additional experiments will continue. That was all they
24 said in the proxy.

25 In the July 2021 press release, the company said

1 there about glucoWISE, that they were working towards
2 developing a non-invasive gluco sensing "prototype," and
3 that it had not -- was not commercially ready. They called
4 it a prototype or a prototype concept that they were working
5 towards developing, and they said that it was clear that it
6 was in a laboratory environment and they had not yet done
7 any pre-clinical human studies.

8 Importantly, the company in that very same press
9 release said there were a number of challenges to gluco
10 sensing non-invasive technology and instead they included
11 the weak signature of the glucose molecule, signal
12 interference from other biological substances, and ambient
13 temperature and skin moisture factors. That's Exhibit EF-1.

14 So Meta was not touting this as scientifically
15 proven. It clearly disclosed that this technology was a
16 prototype in development, it's very early stages, and it was
17 years away from any commercial use whatsoever. So there was
18 no misstatement.

19 THE COURT: What about with regard to the metaAIR
20 eyewear product? There are slides showing three different
21 colors that it was supposedly able to deflect. It's
22 apparently undisputed that it only did one color.

23 MR. WATTS: Yes. So you are referring to the
24 single slide used in the investor presentation and also in a
25 fact sheet by the company.

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1 THE COURT: Right.

2 MR. WATTS: There is no indication, if you look at
3 that picture and the description of the technology beneath
4 it, what that picture is of. Is it of the metaAIR
5 eyeglasses, or is it of the holoOPTIX technology. Now, it's
6 not in the record, Your Honor, the picture is of the
7 holoOPTIX technology, not of the metaAIR glasses. Those
8 three colored circles, clearly, are not glasses. Glasses
9 sit on the bridge of the nose and would have two lenses, not
10 three.

11 When it comes to the allegation of misleading
12 statements about the color and the wavelengths.

13 THE COURT: Right.

14 MR. WATTS: So I think it's judicially noticeable
15 that there are many wavelengths of green. And when a
16 company says they are able to block wavelengths, they were
17 referring to wavelengths of green.

18 Not in the record, Your Honor, but the laser
19 strike technology used to try to blind pilots is typically a
20 green laser.

21 THE COURT: To do what?

22 MR. WATTS: Typically a green laser.

23 THE COURT: I didn't hear what you said earlier.
24 To train? You said something about pilots.

25 MR. WATTS: Yes. So the whole purpose of the

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1 metaAIR glasses or that technology was to prevent laser
2 strikes to blind pilots while flying. And typically those
3 lasers are green.

4 And then Plaintiffs presume that the failure to
5 block blue and red is a defect. It could also be a feature,
6 because a pilot must also read an instrument panel in front
7 of him or her which has readouts in other colors, including
8 blue and red. So if it blocks all blue, all red, all green,
9 they are blind in their instrument panel as well. So they
10 presume it's a defect as opposed to a feature. I don't
11 think that's accurate. But regardless, I mean, the company
12 clearly disclosed where it was in development, how basic it
13 was commercially, and how they had partnered with Airbus and
14 Satair to develop and distribute the product.

15 THE COURT: All right. The Section 11, and 14 A
16 claims, it's your position that those sound in fraud or
17 don't sound in fraud?

18 MR. WATTS: Yes, that they sound in fraud.

19 THE COURT: And that's because it's the whole
20 overarching theory of the complaint. But they are different
21 statements, correct? They are segregated in a different
22 part of -- actually, under the 11 A and 14 A claims and
23 other than the now moving towards commercializing products,
24 they are different and separate statements, correct?

25 MR. WATTS: No, Your Honor. I believe that they

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1 actually have more overlapping statements than just the ones
2 you referenced. I believe the other same operative fact
3 allegations would include allegations regarding metaAIR,
4 glucoWISE, NanoWeb, and the lack of high volume production
5 capacity and the Airbus/Satair commercial or partnership
6 relationship.

7 I point the Court to paragraphs 109, 274 and 302.

8 The other reasons why the complaint as to the
9 Section 11 and 14 A claims sound in fraud are because,
10 again, the complaint says, upfront and in their opposition,
11 that the merger was secured through fraudulent means, right,
12 a merger effectuated by a 14 A, a 14 A proxy statement. And
13 they even say in the opposition, that is what occurred here.
14 And also, you know, they are the same Defendants as to all
15 claims. They don't try to parcel out those who are fraud
16 Defendants verse those who are not.

17 THE COURT: Are the same Defendants named in
18 the 11 -- the Section 11 and 14 A claims and the 10 B 5, are
19 they all the same?

20 MR. WATTS: I believe so, yes, Your Honor. And,
21 again, also, you know, the overlapping alleged
22 misstatements. And Plaintiffs try to lean into -- that
23 they've disclaimed a fraud-based claim in their Section 11
24 and Section 14 A portions of their complaint. But the
25 caselaw is clear they can't do that. That doesn't get them

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1 out of jail free. They've got to actually have
2 nonoverlapping factual allegations.

3 THE COURT: Okay. What about the significance of
4 the statement that LamdaGuard, LamdaLux and LamdaSolar have
5 minimal operational activity? Plaintiff alleges this is
6 false because they had no activity.

7 Why isn't that an actionable statement?

8 MR. WATTS: So that, to me, Your Honor, that comes
9 across as semantic nitpicking. So what they are saying is
10 that for that distinction to be worthwhile to an investor,
11 an investor would have chosen to invest in Meta if the
12 LamdaLux and LamdaSolar divisions had minimal activity, but
13 would not if it had no activity. That's really the fulcrum.
14 I don't believe that's plausible.

15 It's also clear that, you know, just because
16 divisions are not active or minimally active, doesn't mean
17 they are not developing technologies in other areas, parts
18 of the business that would overlap with those technologies
19 like metaAIR, metaSOLAR, glucoWISE, NanoWeb, etcetera.

20 THE COURT: What about the manufacturing capacity?
21 Is it your position that you revealed that you didn't have
22 any manufacturing capacity?

23 MR. WATTS: I wouldn't say any, Your Honor. We
24 were very clear about what we did have, which was low volume
25 prototype sample-type production capacity. So, you know,

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1 the phrase they take issue with in their complaint is the
2 phrase, "scalable manufacturing methods," close quote. And
3 they argue it implies that we were somehow scaling
4 production and distributing our products. They allege that
5 in paragraphs 114 and 118 of their complaint. But scalable
6 does not mean scaled. And having a scalable method does not
7 mean that a company has built or will soon build an actual
8 large volume production line for any particular product.
9 Meta disclosed in the proxy on pages 53 and 54 and on 59
10 that its Canadian facility in Nova Scotia does not have
11 enough space and ability to have production line. They
12 disclosed --

13 THE COURT: Was that the only facility?

14 MR. WATTS: No. They had one in Pleasanton,
15 California, as well.

16 It also disclosed elsewhere in the proxy that --
17 and this deals with the California facility, again, proxy at
18 pages 50 and 51, that they only produced samples and at
19 small volume scale. And Meta disclosed in the proxy, the
20 same pages, that while it had plans to scale production,
21 larger scale and volumes, it did not provide any timeline in
22 which it would do so, and that it would require additional
23 growth capital to be able to make that production line -- to
24 build it.

25 And then finally, with respect to the NanoWeb,

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1 which, again, as we mentioned, I mentioned earlier, it was
2 in the early development stages, they disclosed in the
3 proxy, on page 60, that they had plans to build a
4 small-scale wafer-to-wafer NanoWeb production line and a
5 pilot-scale roll-to-roll NanoWeb production line. Again,
6 pilot scale, small scale, they never disclosed that they had
7 a plan to do a large volume production of the NanoWeb. And
8 again said that producing larger scale and volumes would
9 require additional growth capital.

10 THE COURT: Okay. Anything else you want to add
11 before I hear?

12 MR. WATTS: One last thing, Your Honor.

13 THE COURT: Okay.

14 MR. WATTS: And that is, you know, it's my view
15 that in light of the company's language on both moving
16 towards and also scalable methods, but also the fact the
17 company disclosed real risks to the investing public about
18 how these products may never see a market.

19 I'll point you to one quotation from the proxy,
20 which is Exhibit B at page 53, where Meta disclosed, quote:
21 There can be no assurances that such research and market
22 development activities will prove profitable or that the
23 resulting markets and/or products, if any, will be
24 commercially viable or successfully produced and marketed,
25 close quote.

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1 THE COURT: How do you square that with now moving
2 towards commercializing products? They seem to be
3 inconsistent statements.

4 MR. WATTS: Well, actually, no, Your Honor. For
5 example, one could argue they had commercialized metaAIR,
6 the eyeglasses. They had sold 50 units.

7 THE COURT: Well, the statement you just --

8 MR. WATTS: That was far from successful.

9 THE COURT: The statement you just read, was that
10 a statement referring to all of the products, though?

11 MR. WATTS: It was not specific to any particular
12 product. It was a general statement, yeah. So you can --
13 you can commercialize a product that failed commercially,
14 right? If the market doesn't take the product, doesn't find
15 it worth the money. For example, metaAIR, as Plaintiffs
16 allege, they sold fewer than a hundred pairs of eyeglasses.
17 That was commercialized in some sense. They were selling
18 them. Just not to wide demand, unfortunately. So that can
19 happen.

20 So in addition to the risk the company disclosed,
21 I believe the fourth reason that the complaint should be
22 dismissed is that Plaintiffs have pled themselves out of a
23 claim because they allege in their complaint in several
24 places that the market was fully aware of Meta's production
25 limitations and its failures in product line development.

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1 So for example, in paragraph 49 of the complaint,
2 Plaintiffs allege, quote: Meta's lack of success at
3 bringing any products to market and had, in fact, cultivated
4 a long list of product and development failures, close
5 quote. They say investors were aware of this from day one
6 of the class period. How could investors have been misled
7 that they knew about that on day one of the class period?

8 In paragraph 50, Plaintiffs allege, quote: The
9 market was skeptical of the Torchlight/Meta transaction in
10 the first place, close quote.

11 In paragraph 75, Plaintiffs allege that the
12 Kerrisdale Capital report, quote, simply reaffirmed, close
13 quote, investors already held skepticism about Meta
14 Materials.

15 THE COURT: When was that report issued in
16 connection with the stock purchase here, though?

17 MR. WATTS: That report was issued in December of
18 2021. The class period starts in September of 2021. But
19 again, the paragraphs 49 and 50, Plaintiffs allege that it
20 was known from day one, September 21st of 2020, that
21 investors were skeptical of Meta Materials' abilities to
22 actually develop a product.

23 THE COURT: Does that insulate false statements in
24 reports or proxy statements?

25 MR. WATTS: I mean, it may not always, Your Honor.

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1 I agree with you on that. I can see your skepticism;
2 however, I think any time you analyze particularly alleged
3 misstatements, you must view it in context of the overall
4 disclosures by the company. So for example, investors
5 should be presumed to have been aware of the company's other
6 public statements when it reads a press release or reads a
7 class period misstatement.

8 THE COURT: Well, are these the company's
9 statements, though, or someone else's statements?

10 MR. WATTS: Company statements. So for example --

11 THE COURT: The market skeptical statement was
12 something the company said?

13 MR. WATTS: No. That's what Plaintiffs allege in
14 their complaint.

15 THE COURT: Oh.

16 MR. WATTS: Yeah.

17 THE COURT: Okay.

18 MR. WATTS: Which is why I argue that they pled
19 themselves out of the claim. But as far as, you know,
20 context mattering, when you consider an alleged false
21 statement, I point the Court to several decisions from the
22 2nd Circuit on this. One is Ganino, at 167. In that case,
23 the Court said that if the information is already known to
24 the market, the misrepresentation cannot then defraud the
25 market.

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1 This Court's decision in Emerson, at 245 and 246,
2 which quotes, the 2nd Circuit's international paper
3 decision. There the Court said that, you know, in analyzing
4 an alleged misstatement, it must be viewed in the context of
5 the total mix of information and that total mix includes
6 information already in the public domain and facts known or
7 reasonably available to shareholders at the time.

8 THE COURT: But with regard to the report that's
9 referenced, the one that talks about what a terrible company
10 this was, are there stock sales alleged -- in other words,
11 does the period of sales here post date that report?

12 MR. WATTS: Yes. So Plaintiffs punitive class
13 period extends from September 21st of 2020 through July --
14 let me get the right date, here, Your Honor -- to July 24th
15 of 2022.

16 THE COURT: So --

17 MR. WATTS: Sorry, June 24th of 2022. And the
18 Kerrisdale Capital report came out on December 14th of 2021.

19 THE COURT: So would it be your position that any
20 stock after that report couldn't possibly be actionable, any
21 sale?

22 MR. WATTS: Yes, as I argue, as Plaintiffs argue
23 in their opposition and also in their complaint that this
24 Kerrisdale report basically validated or reaffirmed investor
25 concerns about Meta Materials and that it was a thorough

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1 report and, in fact, if I can quote the actual language,
2 they say -- hold up, here. Here we go. Yeah, they say that
3 that report, in paragraph 75, that it thoroughly documented
4 exactly how Meta consistently and materially mislead the
5 investing public and that for investors who were already
6 skeptical of Meta and the merger simply reaffirmed how Meta
7 habitually made outlandish and misleading claims about the
8 feasibility, development and commercial potential of various
9 technologies.

10 So it's my position the whole case should be
11 dismissed, but if for some reason it's not, the class period
12 cannot extend beyond that Kerrisdale Capital report, because
13 they allege in their own complaint that they put everybody
14 on notice about all the alleged fraud, all the alleged
15 grandiose statements about the products and development and
16 that's where the class period should end.

17 And I would point the Court to the Barclays
18 decision at 97 from the Southern District which supports
19 that -- and I'll quote that case. In Barclays, like I just
20 said, quote: In the case of a securities fraud class
21 action, courts are required to cut off the class period on
22 the date of a statement or event that cures the market,
23 close quote.

24 THE COURT: Okay, thank you.

25 Counsel, let me just ask you to address that

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1 first. You have alleged this report was out there as part
2 of the market mix. How could anybody have been mislead
3 after that report issued?

4 MR. APTON: Sure, Your Honor. So one component of
5 the case, and this ties into our theory of lost causation.

6 Is this mic on?

7 THE COURT: Yes, I can hear you.

8 MR. APTON: Thank you, sorry.

9 One component of our theory of lost causation is
10 that this merger was consummated, at least in part, to
11 provide access for the Canadian Meta Materials company to
12 gain access to the public markets here in the United States.
13 Cash was desperately needed and as soon as this merger was
14 in the works, they started to take advantage of that and so
15 the June 2022 follow-on offering or cap raise was really the
16 culmination of everything that was already in the works.
17 Kerrisdale Capital, in December of 2021, certainly caused
18 damages, put people on notice. But in terms of when the
19 fraud was -- I'm not personally a fan of this expression,
20 but when it was fully revealed, when Defendants conducted
21 this final dilutive offering in June of 2022, I mean, it hit
22 people hard. It took whatever value was left in the stock
23 and just wiped it out. And so that's why we continued the
24 class period to that point in time, Your Honor.

25 THE COURT: But how does it cover people who made

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1 purchases after the report? I know that you are saying
2 people that were holding the stock at the time the report
3 came out, that's something different.

4 MR. APTON: Sure.

5 THE COURT: But how would it cover investors who
6 purchased after that report was issued?

7 MR. APTON: So as representatives of the class,
8 there are investors who did purchase after Kerrisdale
9 Capital report.

10 THE COURT: Right.

11 MR. APTON: Or even, frankly, those who purchased
12 before Kerrisdale Capital.

13 If Your Honor is willing to let us take discovery
14 and try to prove this theory of lost causation, it may well
15 show, the record of discovery may well show that the market
16 was not -- the fraud was not fully revealed until this final
17 dilutive offering in June of 2022.

18 THE COURT: But hard to be nastier about the
19 company than the report was, right?

20 MR. APTON: The truth is not always flattering,
21 that is true, that is true, Your Honor.

22 THE COURT: But I mean, why wouldn't it all have
23 been out there at the time of that report? I don't
24 understand what you think would have been going on later.

25 MR. APTON: Sure. You know, it's a tough question

1 to answer, respectfully, Your Honor, because I don't
2 presently have the discovery necessary to answer the detail
3 that Your Honor is probably looking for.

4 Lost causation is traditionally pled under Rule 8,
5 and so if given the opportunity, that would certainly be a
6 topic or an area of inquiry that we focus on as the case
7 progresses.

8 THE COURT: Well, what would you hope to show
9 through discovery?

10 MR. APTON: Well, that analysts or investors were
11 not persuaded by the Kerrisdale Capital report. That they
12 believed George Palikaras and Ken Rice, who were the CEO and
13 CFO of the surviving entity, that products were moving
14 towards commercial developments, they had scalable
15 manufacturing methods, and they were about to turn this
16 corner. And then what happens? They revert to their old
17 ways. They conduct this dilutive offering again, and
18 everything is gone at that point.

19 THE COURT: Did you want to address the other
20 points Counsel made?

21 MR. APTON: Yes, Your Honor, if I may.

22 So Your Honor's first question, well, first of
23 all, I do want to -- there are an awful lot of inconsistent
24 statements made by Defendants. Not here today, but in the
25 process.

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1 THE COURT: You mean in their statements; not by
2 Counsel?

3 MR. APTON: No, I have a great deal of respect for
4 Mr. Watts. But there are a lot of inconsistent statements.
5 And so under the caselaw, and I'll refer the Court, if
6 necessary, to the Omega Healthcare case, that's 2nd Circuit
7 from 2020. It's pages 19 of my opposition. When Defendants
8 make a statement, they are required to speak accurately and
9 truthfully and fully about that statement. They cannot make
10 statements that would -- or not make statements that would
11 render other statements misleading. And so, you know, we
12 have a statement, the one that Mr. Watts and Your Honor
13 referenced at first, now moving toward commercializing
14 products. And Your Honor asked Mr. Watts, does that include
15 the holography, the lithography, the metaAIR, the various
16 products? And, you know, Mr. Watts said it was unclear.

17 In paragraph 272, that's an excerpt of that
18 particular statement, and after the now moving toward
19 commercializing products, quote, unquote, statement, the
20 very next sentence is Meta's platform technology includes
21 holography, lithography, medical wireless sensing, referring
22 to the glucoWISE product. And so my reasonable -- I think
23 it's reasonable reading of this excerpt in the proxy
24 statement and it appears repeatedly in other SEC filings and
25 public statements is that this, quote, now moving toward

1 commercializing products, close quote, statement and the
2 scalable manufacturing method statement applies to all of
3 Meta Materials's products. It's not limited to just some
4 here, some there, which, by the way, is not specified
5 anywhere. You have this mantra, if you will, that's being
6 fed to investors time and again, that the company, despite
7 its past failures, it is now moving toward commercializing
8 products. It has scalable manufacturing methods. To an
9 ordinary investor, a reasonable investor, this means Meta
10 Materials is ready to go. And that's why people invested.
11 And so Your Honor, I would say that while the market was --
12 and we do allege that the market was skeptical of Meta
13 Materials' past performances or failures, these statements
14 are highly material for that particular reason.

15 THE COURT: So you think the significant word is
16 "now"?

17 MR. APTON: Well, I -- yes, I do think in -- yes,
18 "now" is certainly a significant word, but a very more
19 significant word perhaps or equally significant,
20 "commercializing." That's a specific term. If the Court
21 has looked at the QuantumScape case, on pages 14 to 16 of my
22 opposition, I cite three different cases. The first is the
23 QuantumScape case. And that QuantumScape case illustrates,
24 I think quite well, actually, that when a company says it's
25 ready to do something or will do something or, specifically,

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1 it's ready to commercialize, that's what they say in
2 QuantumScape relating to their product, which happened to be
3 solid state matters. That means all other obstacles --

4 THE COURT: Well, that was a little bit more
5 specific statement. It said it was ready to commercialize.
6 Not now moving towards.

7 MR. APTON: True. In fact, in QuantumScape, it
8 actually qualified the commercialization statement by saying
9 that the only major step remaining was -- sorry, I lost my
10 line of sight, here. It said that it was ready to -- ready
11 for commercialization with the only remaining steps being
12 ramping up production. Meta Materials doesn't even qualify
13 their statement. They just say that they are now moving
14 toward commercializing products and they have scalable
15 manufacturing methods. I see that as -- this case is, I
16 guess, worse or more egregious or more false than the
17 statement in Quantum's.

18 THE COURT: What about all of the disclaimers,
19 though, that Counsel has referenced?

20 MR. APTON: Well, that goes to what I was getting
21 at initially, Your Honor, with the Omega Healthcare case.
22 And actually, it came up in QuantumScape, too. A company
23 can't make a boatload of grandiose fanciful statements, and
24 then at the very end, in some small footnotes, disclaim
25 everything it said prior.

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1 THE COURT: Was it small footnotes that they were
2 disclaiming? Was it in small footnotes somewhere, or in the
3 body of the statement you are complaining about?

4 MR. APTON: Fair enough. I suppose it would be in
5 the same font size in the cautionary language. I don't know
6 where exactly Counsel found the risk warning or the language
7 that he referred to before he ended his presentation, but I
8 would -- was it -- can I ask Counsel, was it in an annual
9 report, that risk warning?

10 MR. WATTS: It's in the proxy for sure.

11 MR. APTON: It's in the proxy. I mean, that was a
12 very nondescript general disclaimer about we may never get
13 to -- I'll paraphrase, we may never successfully sell our
14 products and make a profit. Every company that files
15 anything with the SEC that makes a product probably has a
16 risk warning similar --

17 THE COURT: That's because they don't want to be
18 sued by you.

19 MR. APTON: Well, there are other ways not to be
20 sued by firms like mine.

21 THE COURT: That was not meant at all to be
22 disparaging towards your --

23 MR. APTON: No, Your Honor, I didn't take it as
24 such.

25 THE COURT: Are there any other points you want to

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1 highlight?

2 MR. APTON: Yes, Your Honor.

3 Defense Counsel, in their brief, made a point
4 about arguing our case should be subject to a heightened
5 pleading standard.

6 THE COURT: Right.

7 MR. APTON: It shouldn't be. Section 11 is
8 traditionally judged under Rule 8 at this point. The Fresno
9 v. comScore case really provides a strong reading on the
10 current status of the law. I can give the Court that cite
11 if it would like.

12 THE COURT: But there are other cases that talk
13 about if you have the same basic theory of fraud in your
14 complaint and it effectively covers the Section 11 and 14 A
15 claims that you are stuck with having alleged fraud.

16 MR. APTON: Well, sure, Your Honor, yeah. If
17 there are exact overlap.

18 THE COURT: Does the overlap have to be exact?

19 MR. APTON: Well, so, Your Honor, in Fresno v.
20 comScore, it would suggest that, yeah, it needs to be.
21 Fresno v. comScore really does provide a good illustrative
22 or tutorial on when Section 11 should -- sorry, when Rule 8
23 should apply to Section 11 claims and when Rule 9(b) should
24 apply.

25 I just want to point out or correct Counsel. Not

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1 all the Defendants are the same across the counts.

2 THE COURT: I thought that would -- I recognize
3 that.

4 MR. APTON: Thank you, Your Honor.

5 And though I am not making any concession, even if
6 Rule 9(b) were to apply, we still meet that standard.
7 Rule 9(b), if you look at Rombach v. Chang, which dates back
8 to the Casmass v. Hassett case, you just need four
9 requirements to meet the pleading standard on Rule 9(b).
10 Specify the statements, we have done that, identify the
11 speaker, we've done that, state where and when the
12 statements were made, done that, and explain why the
13 statements were fraudulent, which we've done that.

14 THE COURT: Do you need scienter?

15 MR. APTON: No, you don't need scienter, Your
16 Honor.

17 THE COURT: You only need it under 10(b).

18 MR. APTON: And that's where the PSRA the
19 heightened pleading standard weighing of inferences come
20 into play which for our 10(b) claims, we do satisfy that
21 standard. We do not have general corporate motives here, as
22 Counsel has argued. We have very particularized financial
23 interests.

24 THE COURT: Why aren't they the same financial
25 interests with regard to every shareholder?

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1 MR. APTON: Oh, I'm sorry, I meant the Defendants'
2 motive. The Defendants' financial interests.

3 THE COURT: Right.

4 MR. APTON: Oh, I see your question, Your Honor.

5 THE COURT: Yes.

6 MR. APTON: My apologies. So let's take Brda and
7 McCabe, who are CEO and chairman of the Torchlight entity.
8 They were on the brink of financial ruin. Brda, who was the
9 CEO, his salary was being unpaid accrued. He was owed
10 several hundred thousand dollars by the company for
11 day-to-day work. He had McCabe, who had personally invested
12 millions of dollars in keeping the company afloat. If they
13 could affect a change of control, Brda gets cashed out, he
14 gets his bonus, he gets his options accelerated which were
15 worth \$9 million at the time of the merger. McCabe gets to
16 keep his legacy oil and gas interests. He gets to decide
17 when they are going to be sold. You don't get tossed into
18 some bankruptcy court to creditors and debtors. Whereas,
19 Meta Materials, they got access to the NASDAQ. That's
20 significant. They were able to immediately start raising
21 badly needed capital, which, by the way, they needed so bad
22 because they were in breach of a debt covenant with one of
23 their creditors at the time. So these are not the ordinary
24 general corporate motives that courts typically reject in
25 unsuccessful cases.

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1 THE COURT: Okay. Anything else you need to?

2 MR. APTON: No, Your Honor. I don't think so.

3 THE COURT: Okay.

4 MR. APTON: Thank you.

5 THE COURT: Thank you. Do you have anything you
6 desperately needed to address?

7 MR. WATTS: Your Honor, I'm always desperate for
8 one more word, but I do have -- it will take two minutes.

9 THE COURT: Okay, sure.

10 MR. WATTS: Thank you, Your Honor.

11 With respect to the Kerrisdale Capital report,
12 while admittedly, that is an unflattering report, as you
13 mentioned, however, let's remember who the authors are.
14 These are short sellers. Their motivation is to drive the
15 company stock price down so they can profit from that
16 depressed price. That is their motivation. They disclose
17 that throughout and the back of the that report. So that is
18 their motivation. Everything they say should be taken with
19 a grain of salt because that is what they do, that is their
20 business model. Number two, Plaintiff mentions that the
21 class period should only end once there was, in his words, a
22 dilutive offering. There were many offerings during the
23 class period. The least -- one of the lower dollar amounts
24 raised during that class period was the one that ended the
25 class period for 37 and a half million. There was a much

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1 larger one in middle class period. The one point I want to
2 make sheer is that every offering is dilutive, by function
3 of issuing more securities, you are diluting those who
4 already own the security. That's how offering works.
5 Number three, he mentioned that the moving towards language
6 clearly, in his mind, should apply to every product that
7 Meta Materials develops.

8 THE COURT: All right.

9 MR. WATTS: And, therefore, it infects the entire
10 business. Well, as you walked me through during my opening
11 presentation, we went through NanoWeb, metaAIR, and I shared
12 with you the actual specific disclosures about those
13 technologies being in development in their early stages. So
14 clearly there is way more out there in the proxy statement
15 and elsewhere about the actual status of those products than
16 just the generalized language he wants to hang his hat on
17 which is moving towards commercialization.

18 THE COURT: No, but you don't disagree that moving
19 towards commercialization applied to all of the products?

20 MR. WATTS: No, I'm saying I don't know what it
21 applied to.

22 THE COURT: Well, how would someone reasonably
23 read it, then, if you don't know what it applied to?

24 MR. WATTS: Well, so in the very same document --

25 THE COURT: Right.

1 MR. WATTS: -- up top, they say now moving towards
2 commercializing products. And then throughout the rest of
3 the proxy, they disclose where they are as to each of these
4 products. So if a reasonable investor were to read the
5 proxy, they would say, okay, they're moving towards
6 commercialization, at least of metaAIR, where they have
7 these eyeglasses they are selling to the market, but clearly
8 it doesn't apply to NanoWeb because they've disclosed that
9 NanoWeb is in its early stages of merely a prototype. It
10 doesn't apply to other technologies because clearly they are
11 only in development and not ready for commercialization. I
12 don't think you can pull that language across. Regardless,
13 Your Honor, that type of language --

14 THE COURT: Yes?

15 MR. WATTS: -- that has been found by courts to be
16 nothing but inactionable puffery. So for example, I will
17 point the Court to the Aratanacase, Southern District of
18 2018, pages 757 and 758, where the Court found the following
19 statement to be immaterial, puffery and inactionable: The
20 company said they had, quote, made remarkable progress
21 towards commercialization of a drug and that they were,
22 quote, on track to have these products reach the market in
23 2016, close quote.

24 So that statement was viewed as being mere
25 puffery. And in that statement, the company actually

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1 pinpointed when they would have the products hit the market.

2 THE COURT: Which case is that, that you are
3 making reference to?

4 MR. WATTS: That's Aratana SDNY 2018 at pages 757
5 and 758.

6 Another case, similar, is the NVE decision out of
7 the Federal Court in Minnesota at page 901. There, the
8 company said, quote, it was in a good position to capitalize
9 on the commercialization of EMRAM technology, and would be
10 in production at the same time as a competitor.

11 Again, that statement was found to have been
12 immaterial puffery because of the moving or the
13 commercialization-type language, like here. And they,
14 again, pointing to a point in time when they would have
15 those products on the market the same time as the
16 competitor. That is something Meta Materials did not do.

17 THE COURT: Anything else?

18 MR. WATTS: Last point, and one apology. The last
19 point is that on the heightened pleading standard whether it
20 be Rule 8 or Rule 9(b), in my opinion, their complaint even
21 fails to satisfy Rule 8 because of the implausibility of
22 their complaint when you read all the allegations in toto.
23 And then when it comes -- and the apology, Your Honor, the
24 Plaintiff is correct. There isn't a complete synchronicity
25 or overlap of the Defendants in the securities act and

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1 exchange act claims; however, all Defendants are in the
2 fraud-based claim and they peel out just Mr. Palikaras and
3 Mr. Rice from the securities act claim. That's all, thank
4 you.

5 THE COURT: Thank you, both.

6 MR. APTON: Thank you, Your Honor.

7 (Matter concluded.)

8 * * * * *

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10 I certify that the foregoing is a correct transcript from
11 the record of proceedings in the above-entitled matter.

12 /s/ Jamie A. Stanton

February 27, 2023

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JAMIE A. STANTON

DATE

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